

(1956) 04 PAT CK 0028

In the Patna High Court

Case No : Supreme Court Appeal No. 67 of 1953

K.S. Kanji and Co.

APPELLANT

Vs

Jatashankar Dossa and Others

RESPONDENT

Date of Decision : 20-04-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 110
Constitution of India, 1950 — Article 133
Limitation Act, 1908 — Article 48

Citation : AIR 1956 Patna 526

Hon'ble Judges : Das, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : P.R. Das and S.C. Mazumdar, for the Appellant; Mahabir Prasad, R.S. Chatterji and S.K. Sarkar, for the Respondent

Final Decision : Allowed

Judgement

Kanhaiya Singh, J.—This is an application for a certificate for leave to appeal to the Supreme Court on the ground that the appeal involves some substantial question of law. A Division Bench of this Court by its judgment dated 23-4-1953, affirmed the decision of the Court below dated 30-3-1946.

Where the decree of the High Court is one of affirmance, an appeal shall lie to the Supreme Court under Article 133 of the Constitution only when (1) the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000/-, and (2) the appeal involves some substantial question of law. Unless these two conditions are satisfied, leave to appeal cannot be allowed.

2. Now, it is to be seen, first, whether the requisites as to the value of the subject-matter of the dispute are satisfied in this case. Jatashankar Dossa and others, the plaintiffs-respondents, valued their suit for purposes of jurisdiction at Rs. 2100/-. They also assessed the amount of damages tentatively at Rs. 500/-.

Since the damage had to be ascertained in future, they could not give the precise assessment of the damages they had suffered on account of the conversion made by the defendants. Therefore, one of the reliefs claimed by them was that an enquiry be made and the quantity of coal cut and removed by the defendants from the plaintiffs' coal-land as also the quantity of the coal rendered unworkable be ascertained and a decree for the value thereof by way of damages be granted to the plaintiffs against the defendants.

Therefore, for purposes of both the suit and this appeal the value of the subject-matter of the dispute is Rs. 2100/- plus the value of the coal removed and misappropriated by the defendants as well as the value of the coal rendered unworkable. Since this had not been ascertained, this Court directed the Subordinate Judge of Dhanbad to make an enquiry as to the valuation of the subject-matter in dispute at the time of the institution of the suit and also the valuation of the subject-matter now in appeal to the Supreme Court.

The learned Subordinate Judge after hearing the parties and taking evidence, submitted his report on 20-4-1955. According to his findings, the value of the subject-matter in dispute, that is, the quantity of coal removed and rendered unworkable, was Rs. 24,000/- at the date of the institution and somewhere within Rs. 40,000/- to Rs. 48,000/- at the date the appeal was preferred.

The concurrent findings of the High Court and the Court below were that 12731 tons of coal had been cut away by the defendants from the plaintiffs' land and 36763 tons more had been rendered unworkable. According to the evidence led by the appellants, and not controverted by the respondents, the profit from coal would work out at the minimum rate of eight annas per ton. The respondents refrained from adducing any evidence in denial of the assertions made by the appellants' witnesses, presumably because any under-estimate by them at this stage would react upon their claim for mesne profits.

He that as it may, the fact is that there is the unchallenged evidence on behalf of the appellants that the minimum profit would be eight annas per ton. Relying upon this evidence, the learned Subordinate Judge assessed the amount of damage, at the rate of eight annas per ton. On this basis, the value of the subject-matter of the dispute in the Court of first instance would be Rs. 25,462/- plus Rs. 2100/-. The respondents have not questioned the correctness of the findings of the learned Subordinate Judge. They, however, urged that the appellants were estopped from questioning the value of the subject-matter of the dispute in view of the valuation put by them on appeal before the High Court. This contention is without any substance.

Neither in the Court of first instance nor in the High Court, the question of the actual amount of damages payable to the plaintiffs appropriately arose. The plaintiffs had given a tentative valuation, and that was enough. The actual amount of damages had to be worked out in a subsequent proceeding or mesne profits.

The contentions on behalf of the respondents must, therefore, be overruled. It must be held, therefore that the valuation of the subject-matter in dispute at the time of the institution of the suit was Rs. 25,462/- plus Rs. 2100/-, and the valuation of the subject-matter now in appeal was far in excess of that amount, in the neighbourhood of Rs. 40,000/-to Rs. 48,000/-. The first condition, therefore, is fulfilled.

3. The next and the most important question is whether some substantial question of law is involved in this appeal. The short facts, so far as they are relevant to this question, are these: The plaintiffs-respondents brought this action in respect of an underground trespass on their coal mine and coal mining lands alleged to have been committed by the defendants-appellants and for damages arising therefrom.

The plaintiffs and the defendants were lessees of coal mining rights in contiguous plots of land In village Kujama, the plaintiffs having their right in 300 bighas and the defendants in 96 bighas immediately to the north. The plaintiffs alleged that the defendants had over-stepped the limits of their coal-land and trespassed into the coal-lands of the plaintiffs and that the defendants had removed coal from the encroached portion and had rendered the remaining coal of the encroached portion unworkable by the plaintiffs by reason of certain rules under the Indian Mines Act.

On these allegations, the plaintiffs asked for (a) a determination of the boundary line between their coal-land and the coal land of the defendants; (b) recovery of possession of the portion encroached upon by the defendants; (c) a permanent injunction against the defendants restraining them from making further encroachment by cutting and removing the coal from the plaintiffs' coal-land; and (d) damages for the value of the coal wrongfully removed by the defendants and of the coal rendered unworkable in the encroached portion.

The defendants appellants in their defence denied the encroachment and also pleaded limitation. Both the Court of first instance and the High Court on appeal concurrently found that there had been a trespass by the appellants into the leasehold of the plaintiffs-respondents to a distance of 70 feet.

According to the commissioner, the total area of encroachment was about 7 bighas. In reaching their conclusion, they relied mainly upon the maps which formed part of the leases. The real dispute between the parties with regard to the locus in quo was whether the northern boundary line of the plaintiffs-respondents' leasehold should be drawn from the true meeting point of the four villages, Pande-bera, Jharla Khas, Lodna and Kujama, by drawing a line from that point at 81° 15' or whether the line as actually drawn in the lease map, which is a map to scale, should be taken as the correct boundary.

The contention of Mr. P.R. Das was that the correct boundary should be a line drawn from the true meeting point of the four villages, mentioned above, at a bearing of 81° 15'; whereas the contention of the plaintiffs-respondents was

that the line actually drawn on the lease map correctly laid down the northern boundary of the plaintiffs-respondents' leasehold.

Both the Courts overruled the contention of Mr. P.R. Das. Whether the contention of Mr. P.R. Das or that of the plaintiffs-respondents is correct "" depends upon the construction of the deeds of settlement and the maps incorporated therein. The oral evidence on this point is of little consequence. Now, the construction of the lease also raises a substantial question of law.

4. The question of limitation raised by Mr. P.R. Das is equally a substantial question of law in the present case. It is common ground that Article 48, Limitation Act governs this case. This Article provides for a suit for specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, a period of three years from the time when the person having the right to the possession of the property first learns in whose possession it is.

The important question mooted before the Court, however, was on whom lay the onus to prove this fact, whether it was for the defendants who pleaded the bar of limitation to prove that the suit was not maintainable or whether it was for the plaintiffs to prove at least, *prima facie*, that they learnt about the possession of the defendants within three years of the suit. On this question, there is divergence of judicial opinion among the different High Courts.

So far as this High Court is concerned, there are two Division Bench cases, in which it was definitely held that the onus lay upon the defendants to prove that the plaintiffs knew of the removal or possession of the property prior to the three years of the institution of the suit. (Vide -- Sundarji Shivji Vs. Secy. of State, and -- Srish Chandra Nandy Vs. Ramji Bechar Das and Others, . The Calcutta, Bombay and Allahabad High Courts have however, taken a different view.

In the case of -- "Kalyani Prasad Singh Deo v. The Borrea Coal Co. Ltd." AIR 1946 Gal 123 (C), the Calcutta High Court held that the onus was on the plaintiff. They relied upon the decision of the Allahabad High Court to the same effect in the case of -- Yudhishter Lal Vs. Fateh Singh and Another, .

In the case of -- Kaikhusroo Manekshah Talyarkhan Vs. Gangadas Dwarkadas, , the Bombay High Court also held that the onus was on the plaintiff to prove that he first learnt within three years of the suit that the property which he was seeking to recover was in the possession of the defendant.

In the present case also, my Lord the Chief Justice, who delivered the judgment of the Division Bench, was inclined to adopt a view different from the one taken by this Court in the earlier cases above referred to, and if the point were *res integra*, he might have come to a different finding. There is no decision of the Supreme Court or the Privy Council on this point. If different High Courts have adopted divergent views on the question of onus in cases governed by Article 48, Limitation Act and there is no direct decision of the Supreme Court on this aspect

I of law, then that would indeed be a substantial (question of law.

5. In my opinion, Mr. P.R. Das is entitled to succeed on the ground urged by him, namely, that this appeal raises substantial questions of law. I would accordingly allow the application and certify that this appeal raises substantial questions of law. In the peculiar circumstances of the case and having regard to the sharp conflict of judicial opinion on the point, I would make no order as to costs,

S.K. Das, C.J.

6. I agree.